

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of
Abed's Grocery, Inc.,
WIC Vendor #W6838

FINDINGS_OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:30 a.m. on Tuesday, September 21, 1993 in the Fifth Floor Conference Room, 525 Park Street, St. Paul, Minnesota. The record closed at the conclusion of the hearing.

Wendy Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Minnesota Department of Health. Ronald M. Diker, Attorney at Law, Parkdale 4, Suite 110, 5353 Gamble Drive, Minneapolis, Minnesota 55416-1569, appeared on behalf of the Appellant, Abed's Grocery, Inc.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Health shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Mary Jo O'Brien, Commissioner, Minnesota Department of Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440,

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Appellant was violated Minn. Rule 4617.0065, subp. 2A(3) and, consequently, should not be reauthorized as a vendor in the special supplemental food program for women, infants and children (WIC).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Abed's Grocery, Inc. is a small "mom and pop" convenience store located at 1517 East Lake Street in Minneapolis, Minnesota. It is owned and operated by Abed and Corrine Abusbeih, husband and wife. The grocery store was a WIC vendor pursuant to a two-year contract commencing September 30, 1991. This contract allows the grocery store to sell food items to WIC participants in exchange for WIC vouchers. The vouchers are provided to low-income individuals as a means to ensure a healthy diet for the recipients. Because Abed's Grocery was located in a poor neighborhood, almost

one-half of its business was comprised of sales to WIC participants. WIC vouchers are deposited in a bank just like a check and are cleared through one central bank (the First State Bank of Lake Lillian) before return to the public authority.

2. The contract entered into in September of 1991 by Abed's Grocery sets forth in detail on the first page the minimum amount of stock in certain food items that the vendor must have available for purchase at all times. Included in these requirements is that the vendor shall have available "15 four-ounce or 4.2-ounce containers of infant juice in any combination of at least two varieties." WIC vouchers which authorize the purchase of infant juice are always issued in the amount of 15 containers of juice.

3. WIC contracts with vendors are always written for a two-year period. At the end of the contract period, the vendor must reapply for a reauthorization to continue as a WIC vendor. The Appellant's contract expired on September 26, 1993 and, consequently, an application for reauthorization was submitted by the Appellant on June 7, 1993.

4. After applications for reauthorization are received, an inspection is conducted by a member of the Health Department WIC staff to ensure that all vendor requirements are being met and that the vendors are knowledgeable of the requirements of the program. On July 15, 1993, a WIC inspection of Abed's Grocery was conducted by Mark Peine, an employee of the Department of Health, WIC Program. At the conclusion of the inspection, Mr. Peine informed Corinne Abusbeih that the store had insufficient quantities of infant juice and infant cereal available for sale. Consequently, Mr. Peine determined that the store was out of compliance with WIC Program requirements for reauthorization. Mr. Peine informed Ms. Abusbeih that he would reinspect the store sometime in the next two to four weeks. The notice of noncompliance explained that "if any of the WIC Program requirements are not met at the time of the second visit, you may be disqualified from the program for a period of six months."

5. On August 4, 1993, Mr. Abusbeih was scheduled to fly to Jerusalem, his native city. Consequently, Corinne Abusbeih knew she would be busy helping her husband pack and would take him to the airport in the evening. A friend of Mr. Abusbeih, Sam Osama, had volunteered to clerk at the store on August 4 so that Mr. and Ms. Abusbeih could attend to Mr. Abusbeih's departure. Mr. Osama had spent a few days at the store observing its operation prior to August 4 so that he had a general knowledge of what to do when left alone at the store. On the morning of August 4, the Abusbeih's met Mr. Osama at the store just prior to 8:00 a.m., and after the store was opened, Mr. Osama was left in charge while the Abusbeih's returned home to pack. Mr. Abusbeih placed a sign on the front of the store stating that the store would close at 6:00 p.m.

6. At approximately 9:30 a.m. on August 4, Mark Peine returned to Abed's Grocery to conduct a reinspection for WIC reauthorization. Mr. Peine

found that all WIC requirements were met except for the stock requirement for infant juice. Mr. Peine observed that there were only 12 jars of one kind of infant juice, orange, on the food shelves. Mr. Peine then asked Mr. Osama if there was any more infant juice available for sale in any location in the store. Peine asked Osama to check in the storage areas. Mr. Osama went to the back of the store and returned a few minutes later, stating that there was no more infant juice. Consequently, Mr. Peine wrote out an order of noncompliance which informed the Abusbeihis that they must turn their WIC stamp in to the WIC office by September 5, 1993. They would not be allowed to reapply to be a WIC vendor for six months or March 26, 1994. This notice stated that there was a 30-day period to appeal the findings of the investigator and request a hearing.

7. After Mr. Peine left Abed's Grocery, Mr. Osama immediately telephoned the Abusbeih's who were at home approximately one mile away. He informed them that Mr. Peine had been at the store and determined that they were not in compliance with WIC regulations. The Abusbeih's became very upset and immediately drove to the store. Upon arriving at the store, the Abusbeih's discovered that the reason for the noncompliance was the failure to have an adequate stock of infant fruit juice. However, in the back corner of the store, behind a full shopping cart and several boxes of goods, was one case of mixed fruit juice, one case of apple juice, and one case of pear juice. Mr. Osama had not known that additional quantities of infant juice were available in that location in the storage area. He explained to the Abusbeih's that he had suggested to Mr. Peine that the owners be called but that Mr. Peine said that he was too busy to wait.

8. After talking to Mr. Osama, Corinne Abusbeih immediately called the WIC office and asked for Mark Peine to request that he return to the store to observe the fruit juice in the storage area. However, Mr. Peine was out of the office so a message was left for someone to call her back. Ms. Abusbeih then determined that she should document the existence of the three cases of juice in the store room by taking pictures. There was a camera in the store so Ms. Abusbeih ran across the street to purchase film. Because she could not get film into the camera, she went down the street to Carol's Restaurant where she found a friend, Ray Schmitz, who helped her insert film into the camera. Ms. Abusbeih then returned to the grocery store and took pictures of the cases of fruit juice in the storage area.

9. Later that morning, Kathleen Bennett, a WIC vendor liaison, returned the call to Corinne Abusbeih. At that time, Ms. Abusbeih was still upset and she asked Ms. Bennett how to proceed with the reauthorization. Ms. Abusbeih said nothing at that time about the fact that there was more fruit juice in the back of the store.

10. On August 5, 1993, letters were sent to Corinne and Abed Abusbeih informing them that their application to continue as a vendor on the WIC Program could not be reauthorized. Additionally, that reapplication was permitted six months from the termination of the current contract (March 26, 1994). Attached to these letters was an appeal procedure fact sheet informing the Abusbeih's that they could request an administrative hearing to appeal the determination made by the WIC Program. Subsequently, on August 20, 1993, an appeal was filed by the Abusbeih's attorney, Ronald M. Diker.

11. The Abusbeih's returned their WIC vendor stamp, which is necessary to process a voucher sale, to the Minnesota Department of Health on September 3, 1993.

12. During June and July of 1993, Abed's Grocery sold approximately 340 jars of infant fruit juice to WIC recipients. The grocery store did make some additional sales of fruit juice to non-WIC recipients. The invoice records for purchases of fruit juice by Abed's Grocery from Boyd Houser, a wholesale supplier, show purchases in July of 210 jars of infant juice. However, the Abusbeih's would purchase fruit juice from Banks (another wholesale outlet) if they could get it for a cheaper price. No invoice records were available for the Banks' purchases.

13. Sam Osama only worked by himself at the Abed Grocery for one day, August 4, 1993.

Based upon the foregoing Findings of Fact, the Administrative law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Minnesota Department of Health have jurisdiction in this matter pursuant to Minn. Rule 4617.0100, subp. 1. The Notice of Hearing was proper in all respects and the Department has complied with all other substantive and procedural requirements of law or rule.

2. Minn. Rule 4617.0100, subp. 3, provides the appropriate burden of proof standard for WIC vendor sanction cases such as this. That rule states:

Subp. 3. Burden of proof. A local agency or vendor that appeals the commissioner's denial of an application to participate has the burden of proving the facts at issue by a preponderance of the evidence. When a local agency or vendor appeals a disqualification or other sanction, the commissioner has the burden of proof.

The parties stipulated that Abed's Grocery had the burden of proof in this case .

3. Minn. Rule 4617.0065, subp. 2A.(3) requires that, "a vendor shall at all times keep in stock at least . . . 15 four-ounce or 4.2-ounce jars of infant juice in any combination of at least two varieties . , . ." The vendor contract signed by the Appellants specifically states that the vendor shall "stock and have available for purchase" the amounts of infant juice required by the rule.

4. The Judge has concluded that on August 4, 1993, Abed's Grocery did have sufficient quantities of infant juice "in stock". However, the Judge reads a requirement of availability into the stocking rule as is stated in the vendor contract. Because the clerk working on August 4, 1993 was not aware that additional juice in the back of the store was available for sale, a violation of Minn. Rule 4617.0065, subp. 2A.(3) has been shown.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

1the Judge is not convinced that placing the burden of proof on the Appellant, Abed's Grocery, is a correct reading of the rule and substantive

law. It is clear from the WIC Program rules that the violation alleged herein is a grounds for disqualification as well as an eligibility requirement for an applicant. The essence of this case is that Abed's Grocery was not allowed to continue its participation in the WIC Program. In fact, the Appellant was ordered to return its WIC stamp to the Department of Health approximately three weeks prior to the expiration of its two-year contract. The Judge views this case as much more of a "disqualification" than an application denial. However, in this case, the outcome would not be different if the Department had the burden of proof.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Health take appropriate disciplinary action with respect to the Appellant's license.

Dated this day of September, 1993.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail .

Reported: Taped, No Transcript Prepared

MEMORANDUM

The Department attempted to show that Abed's Grocery did not really have extra juice in the storage room when Mark Peine conducted his reinspection on August 4, 1993; that the Abusbeih's purchased the extra juice for the purpose of taking pictures to support their defense herein. Mark Peine testified that Sam Osama, the clerk on August 4, went into the back of the store where the juice was located and returned stating that there was no extra juice in the storeroom. Additionally, Mr. Osama knew the prices of several items on the shelves which were not marked. The Department contends that Mr. Osama had worked at the store on more than one occasion and was familiar with what was in the store room along with the prices for all of the items to be sold,

The Judge received a letter written by Mr. Osama into the record. Mr. Osama is not an American citizen and chose to not voluntarily attend the hearing to give testimony. The Abusbeih's testified and Mr. Osama's letter indicate that he only worked at the store on one occasion, August 4, 1993, the day that Mr. Abusbeih was to return to Jerusalem for a visit. Mr. Osama stated in his letter that he looked in the office at the store for extra juice and did not go back to the storage room. Mr. Peine testified that he observed Mr. Osama go through a door in the back of the store. Appellants testified that the door in the area of the storage room was locked and could not be

opened; that the only door Mr. Osama could have gone through was the door that led into the office.

The Judge has been persuaded by a preponderance of the evidence that the three cases of infant juice were in the store room at the time that Mr. Peine conducted his reinspection on August 4, 1993. The fact that Abed's Grocery sold more juice than they have purchase records for has no relevance to the

existence of three cases of juice on August 4, 1993. The Judge has concluded additionally that because Mr. Osama was not aware that the juice was in the store, the juice was essentially not available for sale. An "available for sale" condition must be read into Minn. Rule 4617.0065, subp. 2A.(3) in order for the rule to make sense. This interpretation is clearly set forth in the vendor contract of which the Abusbeihis were aware. Consequently, the Judge has found that the referenced rule was violated on August 4, 1993.

As the facts in this matter show, the violation found was the result of an isolated occurrence; a new clerk who was not aware of the fact that additional infant juice was stored in the corner of the storage room behind a shopping cart and other boxes of grocery items. Minn. Rule 4617.0063, subp. 5 specifically provides that an applicant whose reapplication is disapproved cannot reapply for vendor provider status for a period of six months after the ending date of the reapplicant's current vendor contract. The Abusbeihis testified that WIC item purchases in their store constitute approximately one-half of their business. Appellants have already been without their WIC vendor stamp for approximately one month. Pursuant to the cited rule, Appellants will not be able to reapply for vendor status until six months after the ending date of their current contract, which is March 26, 1994. Because of the adverse effect on the Appellant's business that this sanction will have, and the mitigating factors in this case, the Judge feels that the Commissioner should structure a remedy which is appropriate to the facts of the violation found. See, In the Matter of the Insurance Agent's Licenses of Kane, 473 N.W.2d 869, 877-78 (Minn. App. 1991).

P.C.E.